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November 26, 2003

CC: 96-45

RECEIVED

DEC 16 2003

Federal Communications Commission  
Office of the Secretary

TRACKING

Ms. Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE. Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules of Heart of Iowa Communications Cooperative and Iowa Telecommunications Services, Inc. and Petition for Waiver of Sections 69.3(e)(11) and 69.605(c) of the Commission's Rules

Dear Ms. Dortch:

Attached please find an original and four copies of the Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules and Petition for Waiver of Sections 69.3(e)(11) and 69.605(c) of the Commission's Rules being filed by Heart of Iowa Communications Cooperative and Iowa Telecommunications Services, Inc.

We are submitting the requisite filing fees and FCC Form 159 Remittance Advice by courier to Mellon Bank, Pittsburgh, Pennsylvania on this date.

Please acknowledge receipt on the "stamp and return" duplicate document attached for this purpose. All correspondence and inquiries concerning this filing should be addressed to the undersigned.

Respectfully submitted,



David Cosson  
Clifford C. Rohde  
Counsel for Heart of Iowa Communications Cooperative

No. of Copies rec'd  
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Heart of Iowa Communications )  
Cooperative )  
 )  
and )  
 )  
Iowa Telecommunications Services, Inc. )  
d/b/a Iowa Telecom )  
 )  
Joint Petition for Waiver of the )  
Definition of "Study Area" of the )  
Appendix-Glossary of Part 36 of the )  
Commission's Rules )  
 )  
Petition for Waiver of Sections )  
69.3(e)(11) and 69.605(c) of the )  
Commission's Rules )  
  
To: The Commission

**FCC/MELLON NOV 26 2003**

CC Docket No. 96-45

**JOINT PETITION FOR EXPEDITED WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") Rules,<sup>1</sup> Heart of Iowa Communications Cooperative ("Heart of Iowa") and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom ("Iowa Telecom") (together, "Petitioners"), by their attorneys, request a waiver of the definition of "study area" contained in the Appendix—Glossary of Part 36 of the Commission's Rules. Additionally, Heart of Iowa

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<sup>1</sup> 47 C.F.R. § 1.3.

seeks a waiver of the definition of “average schedule company” included in Section 69.605(c) of the Commission’s Rules and of Section 69.3(e)(11) of the Commission’s Rules concerning participation in the National Exchange Carrier Association (“NECA”) carrier common line tariff<sup>2</sup>

Petitioners request these waivers to enable Heart of Iowa to complete its proposed purchase from Iowa Telecom of the latter’s Conrad, Eldora and Steamboat Rock telephone exchanges in Iowa (“the three exchanges”). Petitioners also request that the three exchanges be removed from Iowa Telecom’s study area in Iowa and added to Heart of Iowa’s incumbent study

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<sup>2</sup> Because Heart of Iowa is an average schedule company that wishes to retain its average schedule status, Heart of Iowa submits that it is not required to seek waiver pursuant to Section 61.41(c)(3) of the Commission’s rules. *See, e.g., Norway Rural Telephone Company and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of “Study Area” contained in Part 36, Appendix—Glossary of the Commission’s Rules, Petition for Waiver of Sections 69.3(e)(11) and 69.605(c) of the Commission’s Rules*, CC Docket No. 96-45, Order, 17 FCC Rcd 20127 (Tel. Acc. Pol. Div. 2002) (“*Norway Order*”), *All West Communications, Inc., et al., Joint Petition for Waiver of the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules, Petition for Waiver of Sections 61.41(c), 61.41(d) and 69.3(e)(11)*, Order, 16 FCC Rcd 4697 (Acc. Pol. Div. 2001) (“*All West Order*”).

Only in the event the Commission denies Heart of Iowa’s petition for waiver of Section 69.605(c) of the Commission’s Rules, Heart of Iowa seeks waiver of the price cap “all or nothing” rule in Section 61.41(c)(2), to permit Heart of Iowa to operate under rate-of-return regulation after purchasing three small exchanges from a price cap carrier. In the event such waiver request is required to be contemplated, Heart of Iowa submits that the “gaming” issue of concern to the Commission is not present here. Heart of Iowa is a very small carrier—significantly smaller in fact than any carrier subject to mandatory price caps—that is not seeking to shift costs between price cap and non-price cap affiliates. Nor is Heart of Iowa attempting to establish a rate base by switching back and forth between rate-of-return regulation and price cap regulation. Indeed, Heart of Iowa would be prepared to have such grant of its price cap “all or nothing” waiver request, if required to be made, conditioned upon prior Commission approval should Heart of Iowa subsequently take the unlikely course of seeking to elect price cap regulation. *See Nemont Telephone Cooperative, Inc. et al. Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission’s Rules, Petition for Waiver of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission’s Rules*, Order, 18 FCC Rcd 838, ¶¶ 20-24, (Wir. Comp. Bur. 2003) (“*Nemont Order*”).

area<sup>3</sup>

The Commission is requested to review and approve this Petition expeditiously. The facts and circumstances supporting grant are similar in material respects to those involved in waiver requests that have been approved recently<sup>4</sup> Prompt Commission approval will enable Petitioners to focus time and resources on the exchanges to be served immediately following the purchase transaction, which Petitioners seek to close on or about January 31, 2004

## **I. INTRODUCTION AND SUMMARY**

Iowa Telecom is a price cap incumbent local exchange carrier ("ILEC") that owns and operates approximately 257,000 access lines in nearly 300 exchanges in the state of Iowa. Iowa Telecom owns and operates approximately 174 access lines in the Conrad exchange, 574 in the Eldora exchange, and 67 in the Steamboat Rock exchange—a total of only 815 lines that are the subject of this Petition. After the transaction, Iowa Telecom will continue to provide local telephone service in Iowa and will retain its study area for its remaining exchanges

Heart of Iowa owns and operates, as an average schedule ILEC, approximately 2487 access lines in seven exchanges (Albion, Ferguson, Green Mountain, Haverhill, Liscomb, New

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<sup>3</sup> As described below, Heart of Iowa's ILEC operations have a study area code, 351297, distinct from that of its CLEC operations

<sup>4</sup> See, e.g., *Dickey Rural Telephone Cooperative, et al and Citizens Telecommunications Company of North Dakota, Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c) and (d), 69.3(e)(11) and 69.605(c)*, Order, 17 FCC Rcd 16881 (Wtr Comp. Bur. 2002) ("Dickey Rural Order"), *Petition for Waivers Filed by Baltic Telecom Cooperative, Inc, et al, Concerning Sections 69.3(e)(11), 69.3(i)(4), 69.605(c) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion & Order, 12 FCC Rcd 2433 (Acc Aud. Div. 1997) ("Baltic Order")

Providence, and Union/Whitten) in the state. It intends to bring the purchased exchanges into its ILEC study area.

Heart of Iowa also operates as a facilities-based competitive local exchange carrier (“CLEC”) in the Conrad, Eldora, and Steamboat Rock exchanges, in which it currently owns and operates 937, 1617, and 190 CLEC access lines in the respective exchanges (a total of 2744 lines). The Universal Service Administrative Corporation (USAC) identifies Heart of Iowa’s CLEC operations with a distinct Study Area Code (359005). Upon completion of the acquisition, Heart of Iowa will discontinue CLEC operations in the exchanges and transfer the CLEC subscribers to the ILEC operation.<sup>5</sup>

As will be discussed in more detail below, the factors that the Commission requires for a study area waiver are, or will be, all present in this case: (1) the transfer of the three exchanges from Iowa Telecom to Heart of Iowa will not adversely impact the Universal Service Fund (“USF”), (2) the Iowa Utilities Board of Iowa (“IUB”) does not object to this proposal, and (3) the public interest will be served by granting the waiver. At the same time, because Heart of Iowa is a small average schedule carrier, the conditions for waiver of Sections 69.605(c) and 69.3(e)(11) of the Commission’s rules are present.

Related to this Petition, on this day, the Petitioners are also filing an Application pursuant to Section 214 of the Communications Act of 1934, as amended (the “Act”),<sup>6</sup> seeking the Commission’s consent to transfer control of the three exchanges being acquired by Heart of

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<sup>5</sup> Because Heart of Iowa’s CLEC lines are not part of the transaction between Heart of Iowa and Iowa Telecom, Petitioners submit that the instant Petition need not contemplate the ultimate disposition of such lines.

<sup>6</sup> 47 U.S.C. § 214(a)

Iowa<sup>7</sup> Petitioners submit as well that that they will provide to customers and to the Commission the requisite timely anti-slamming notices required by Section 64.1120 of the Commission's rules.

## **II. WAIVER OF THE FROZEN STUDY AREA DEFINITION IS WARRANTED.**

Petitioners seek a waiver of the frozen study area definition. Part 36 of the Commission's Rules "freezes" the definition of "study area" to the boundaries that were in existence on November 15, 1984. Although the rule was adopted to prevent a carrier from segregating territories artificially to maximize high cost support,<sup>8</sup> the Commission has recognized that changes "that result from the purchase or sale of exchanges in arms-length transactions" do not necessarily raise the concerns which prompted the freeze.<sup>9</sup> Although an indirect and limited corporate relationship between Iowa Telecom and Heart of Iowa exists, the proposed sale to Heart of Iowa is an arm's length transaction<sup>10</sup>

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<sup>7</sup> Copy of which is appended to this Petition as Exhibit 1

<sup>8</sup> See *MTS and WATS Market Structure, Amendment of Part 67 of the Rules and Establishment of a Joint Board, Recommended Decision & Order*, 57 RR 2d 267, ¶ 65 (1984).

<sup>9</sup> See, e.g., *Alltel Corporation Petition for Waiver of Section 36.125(f), Sections 36.154(e)(1) and (2), and the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 5 FCC Rcd 7505, ¶ 7 (Com. Carr. Bur. 1990)

<sup>10</sup> Heart of Iowa owns 551 of 36,438 (1.5%) outstanding preferred non-voting shares, and 94 of 9351 (1.0 percent) outstanding common shares of Iowa Network Services, Inc. ("INS"), which itself owns a 57 percent equity stake in Iowa Telecom. With such a minute interest in INS, Heart of Iowa exerts no control over Iowa Telecom. Also, David Schmidt, Heart of Iowa's General Manager, will conclude his current term as Chairman of the Board of Iowa Network Services in April 2004. The position of INS Chairman of the Board is an elected position unrelated to ownership (except to the extent that only owners' representatives may be Chairman). The Chairman's duties in no way overlap or replace those of the CEO. The INS Board has no control over the sale of any of Iowa Telecom's exchanges. Mr. Schmidt's current term on the board of directors expires in March 2006.

The Commission has recognized that failure to waive the rule in the case of the sale of exchanges would produce an absurd result, forcing the seller to continue to include exchanges in its study area for which it has no costs, and preventing the buyer from including in its study area exchanges it actually serves.<sup>11</sup> Such a result would not serve the Commission's policy objective of ensuring that carriers' actual costs are reflected in their accounting so that they can accurately set just, reasonable and non-discriminatory rates.<sup>12</sup> Inasmuch as Heart of Iowa's proposed acquisition results from an arm's length negotiation process with Iowa Telecom, the standards for waiver of the freeze are met in this instance

**A. The Change in Study Area Boundaries Will Not Adversely Affect the Universal Service Fund.**

To evaluate whether a study area boundary change adversely impacts the USF, the Commission analyzes whether a study area waiver will result in an annual aggregate shift in high-cost support in an amount equal to or greater than one percent of the total high-cost support fund for the year.<sup>13</sup> The proposed transaction will produce no such adverse impact, as Section 54.305 of the Commission's rules provides in pertinent part:

A carrier that acquires telephone exchanges from an unaffiliated carrier shall receive universal service support for the acquired exchanges at the same per-line support levels for which those exchanges were eligible prior to the transfer of the exchanges.<sup>14</sup>

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<sup>11</sup> *Amendment to Part 36 to the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5975-76 (1990) ("Part 36 NPRM").

<sup>12</sup> Iowa Telecom will adjust, pursuant to 47 C.F.R. § 61.45, its price cap prices to reflect removal of the transferred access lines, as applicable.

<sup>13</sup> See, e.g., *U.S. WEST Communications, Inc., and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1774, ¶ 14 (1995) ("Eagle Order"), *Norway Order*, ¶ 9

<sup>14</sup> 47 C.F.R. § 54.305(a).

Notwithstanding Section 54.305(a) of the Commission's Rules, however, Heart of Iowa may still be eligible to receive additional limited high cost support for the purchased access lines. First, Heart of Iowa may be eligible for limited "safety valve" support for new investments in the purchased assets.<sup>15</sup> Second, Heart of Iowa may be eligible for additional interstate common line support ("ICLS"), which Heart of Iowa currently receives.<sup>16</sup>

Nevertheless, it is inconceivable that Heart of Iowa's additional support could rise to \$35 million—the figure that now approximates an aggregated one percent increase of annual high cost support.<sup>17</sup> First, safety valve support, to the extent Heart of Iowa would be eligible, is capped by rule,<sup>18</sup> and would be available in any event only for the 815 lines of the transaction. Second, Heart of Iowa currently receives only an estimated \$58.08 in annual ICLS per line. By adding an additional 815 lines to its study area, at the same per line support level, Heart of Iowa would receive only an additional estimated \$47,335 in annual ICLS.<sup>19</sup> Accordingly, this

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<sup>15</sup> See 47 C.F.R. § 54.305(b)-(f)

<sup>16</sup> See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers in CC Docket No. 00-256, Federal-State Joint Board on Universal Service in CC Docket No. 96-45, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation in CC Docket No. 98-77, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers in CC Docket No. 98-166, Second Report and Order and Further Notice of Proposed Rulemaking, Fifteenth Report and Order, Report and Order, and Report and Order, 16 FCC Rcd 19613, ¶¶ 155-157 (2001) ("MAG Order"), recon pending*

<sup>17</sup> USAC's most recent projections show annual high cost support exceeding \$3.5 billion. See USAC, HC01- High Cost Support Projected by State by Study Area 1Q04, online at <http://www.universalservice.org/overview/filings/2004/Q1/> ("USAC HC01").

<sup>18</sup> See 47 C.F.R. § 54.305(b)-(f)

<sup>19</sup> Initially, ICLS for the acquired lines would be available based on the existing per line ICLS of the acquiring company. These amounts would be subject to true up once cost and revenue data are available. Actual amounts received would be dispersed on a monthly basis and are dependent on the timing of the



transaction is a non-event for purposes of the USF.<sup>20</sup>

**B. State Commission Approval.**

Petitioners have filed a joint *Application for Approval of Discontinuance of Service and Transfer of Certificate* with the IUB, in which Heart of Iowa and Iowa Telecom requested the IUB to state in its final order that it does not object to the grant of this study area waiver.<sup>21</sup> Heart of Iowa and Iowa Telecom will supplement this Joint Petition for Expedited Waivers when the IUB issues its order

**C. Granting The Waiver Is In The Public Interest.**

The transfer of the three exchanges from Iowa Telecom to Heart of Iowa will promote the public interest because it will provide the customers with new services from a locally-based carrier specializing in meeting the communications needs of the few rural communities it serves. For 45 years, Heart of Iowa has offered its customers access to local management, local service personnel, and local service centers. Furthermore, every customer will become an owner of the Cooperative, and will be able to exercise his or her vote in the operation of the Cooperative, including election of members of the Board of Directors.

Heart of Iowa intends to provide quality basic services to the exchange areas it is acquiring, and to improve the existing network where necessary. Heart of Iowa will expand to all

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grant of the waiver request, closing of the acquisition, and submission of updated line counts by the acquiring company

<sup>20</sup> Heart of Iowa recognizes that as a result of the transaction, access lines in the pre-acquisition study area will be eligible for different amounts of high cost support than the access lines being acquired from Iowa Telecom. Heart of Iowa will adopt a methodology for excluding the costs associated with the acquired access lines from the costs associated with the pre-acquisition study area

<sup>21</sup> Attached as Exhibit 2

acquired lines the availability of enhanced services, including Caller ID, voice-mail, local Internet access, and high-speed services such as DSL, the last of which Iowa Telecom does not currently offer to customers affected by the transaction. Accordingly, the public interest would be better served if these operationally distinct exchanges were separated from the exchanges to be retained by Iowa Telecom and placed in Heart of Iowa's study area.

### **III. WAIVER OF THE COMMISSION'S AVERAGE SCHEDULE RULES IS PROPER.**

Heart of Iowa wishes to retain its average schedule status. Thus, Heart of Iowa requests a waiver of Section 69.605(c), if necessary, so that it may retain average schedule status when the Conrad, Eldora and Steamboat Rock exchanges are added to its existing average schedule study area.

Section 69.605(c) defines an "average schedule company" as a telephone company that was participating in average settlements on December 1, 1982.<sup>22</sup> This definition has been interpreted to preclude the creation of new average schedule companies or the conversion of cost companies to average schedule companies after that date without a waiver from the Commission.<sup>23</sup>

The Section 69.605(c) definition refers expressly only to new or converted average schedule companies, and makes no explicit attempt to address the status of existing average schedule companies as they grow or contract via the addition or subtraction of subscribers or exchanges. In some instances, the Commission has not even required waivers of the Section 69.605(c) definition

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<sup>22</sup> See 47 C.F.R. §69.605(c)

<sup>23</sup> See *Wilderness Valley Telephone Company, Petition for Waiver of Section 69.605(c) and 69.3(e)(11) of the Commission's Rules*, Order, 13 FCC Rcd 4511 (Acc. Aud. Div. 1998).

when existing average schedule companies, wishing to retain their average schedule status, acquired price cap or cost exchanges <sup>24</sup>

In other instances, the Commission has granted waivers of the Section 69.605(c) definition when small average schedule companies wishing to retain their average schedule status acquired additional access lines from a price cap or cost exchange. For example, the Commission granted such a waiver to Red River Telecom, Inc. when it acquired 1028 lines from Citizens Telecommunications Company of North Dakota.<sup>25</sup> The Commission granted two average schedule companies, Manti and Skyline, Section 69.605(c) waivers when they acquired 1,887 and 1,407 access lines, respectively, from Qwest, a price cap carrier.<sup>26</sup> Clarksville, an average schedule company and subsidiary of Butler-Bremer Mutual Telephone Company, similarly was granted a Section 69.605(c) waiver when it acquired 931 access lines from U S WEST, a price cap carrier.<sup>27</sup> As indicated, Heart of Iowa is acquiring only 815 access lines from Iowa Telecom.

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<sup>24</sup> See, e.g., *Petitions for Waivers filed by Farmers Mutual Telephone Company, et al., Concerning Sections 61.41(c)(2) and 69.3(e)(11) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission Rules*, AAD 96-6, Memorandum Opinion & Order, 11 FCC Rcd 9380 (Acc. Aud. Div. 1996) ("Farmers Order"); *GTE Midwest Incorporated and Winnebago Cooperative Telephone Association, Joint Petition for Waiver of the Definition of Study Area Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion & Order, 9 FCC Rcd 7789 (Acc. Aud. Div. 1994).

<sup>25</sup> *Dickey Order*, n 79.

<sup>26</sup> *All West Order*

<sup>27</sup> See *Petitions for Waiver Filed by Alpine Communications et al. Concerning Sections 61.41(c)(2), 69.3(e)(11), 69.3(i)(4), 69.605(c) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion & Order, 12 FCC Rcd 2367, ¶ 15 (Acc. Aud. Div. 1997) ("Alpine Order"); see also, *Petition for Waivers filed by East Plains Telecom, Inc. et al., Concerning Sections 69.3(e)(11), 69.3(i)(4) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion & Order, 12 FCC Rcd 24422 (Acc. Aud. Div. 1997) ("East Plains Order"); *Baltic Order* (Commission granted waiver to an average schedule affiliate of Baltic Telecom Cooperative, Inc. also an average schedule company serving 1,400 lines when the affiliate acquired 792 lines from U S WEST).

Grant of this waiver is consistent with that precedent and the Commission's goals in permitting settlements on the basis of average schedules. The special circumstances that the Wireline Competition (f/k/a Common Carrier) Bureau ("Bureau") has found to justify waivers of Section 69.605(c) fall into three broad categories,<sup>28</sup> including a category "to ensure a smooth settlement process [where] average schedule companies . . . have acquired another company, and [have been allowed to merge] the combined companies . . . into one average schedule study area."<sup>29</sup> Because jurisdictional separations and USF calculations are performed at the study area level, the Bureau recognized that the application of Section 69.605(c) in these instances would have the unintended effect of requiring the pre-existing company to convert from average schedule status to cost-based settlements in order for the company to be able to acquire one or more small exchanges. The Bureau determined that such an effect would be unduly burdensome.

The proposed transaction satisfies the same circumstances as those found to justify prior "smooth settlement process" category Section 69 605(c) waivers. Heart of Iowa, an existing and established average schedule company with only 2487 ILEC access lines, is acquiring three small rural exchanges (approximately 815 access lines combined) that it desires to consolidate into its existing Iowa ILEC study area as well as into its existing corporate structure. As noted in this

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<sup>28</sup> See, *BPS Telephone Co., Petition for Waiver of Section 69 605(c) of the Commission's Rules*, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 13820, 13824, ¶ 10 (Acc. Aud. Div. 1997), *Jordan-Soldier Valley Telephone Company and Alpine Communications, L.C.*, Order, 15 FCC Rcd 21917, ¶ 13 (Acc. Pol. Div. 2000)

<sup>29</sup> *Petition for Waiver Filed by Heartland Telecommunications Company of Iowa and Hickory Tech Corp.*, Memorandum Opinion & Order, 14 FCC Rcd 13661, 13663, ¶ 4 (1999) ("*Heartland Order*"). See also, *Baltic Order, Petitions for Waiver Filed by Accent Communications, et al.*, Memorandum Opinion and Order, 11 FCC Rcd 11513 (Acc. Aud. Div. 1996); *BEK Communications I, Inc. et al.*, AAD No. 95-72, Memorandum Opinion & Order, 11 FCC Rcd 10855 (Acc. Aud. Div. 1996).

Petition, the proposed transaction will create significant public interest benefits such as the expansion of improved and enhanced services in the three exchanges.

If Section 69.605(c) were applied to the proposed transaction, it could have the unintended effect of requiring Heart of Iowa to convert its existing exchanges from average schedule status to cost-based settlements. Such a conversion would be unduly burdensome to Heart of Iowa, for it would have to spend on cost studies time and effort that it heretofore has used to ensure and improve the quality of service furnished to its subscribers. Heart of Iowa tentatively estimates that it would cost approximately \$32,500 in annual recurring cost and \$37,500 in non-recurring cost to perform the required cost studies.<sup>30</sup> The high cost of completing a cost study relative to the small size of Heart of Iowa further demonstrates that waiver is warranted

The Commission has declined to permit a waiver when a disproportionate number of the requesting carrier's lines were previously operated on a cost basis or were subject to price caps, or when a waiver would add too greatly to the number of lines that settle on an average schedule basis.<sup>31</sup> For example, the Commission has found it unacceptable that only 2.5% of the total lines to be operated after a transaction were initially average schedule lines. In that order, the Commission negatively cited imbalances of 9.6 %<sup>32</sup> and 57%.<sup>33</sup> Here, Heart of Iowa's current

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<sup>30</sup> Such cost estimates are preliminary, and have been provided to Heart of Iowa by Martin Group. To the extent that Heart of Iowa could recover such costs from NECA pools, they would be borne by the industry.

<sup>31</sup> See, e.g., *Nemont Order*, ¶ 31.

<sup>32</sup> *Nemont Order*, ¶ 32, citing *Heartland Order*, ¶¶ 7-8.

<sup>33</sup> *Nemont Order*, ¶ 32, citing *NebCom, Inc.*, Petition for Waiver of Sections 61.41(c)(2) and 69.605(c) of the Commission's Rules, Order, 13 FCC Rcd 4487, 4492, ¶ 14 (Acc. Aud. Div. 1998).

ILEC lines constitute more than 75% of post transaction lines (when aggregated with the three exchanges' 815 lines—or 2487 of 3302).<sup>34</sup> In *NebCom*, the Commission was concerned that the resulting study area, in which 43% of the total lines would have been converted from a cost study area, would be larger than 57% of all cost study areas. With 3302 post transaction lines, Heart of Iowa's ILEC study area would be larger than only 36% of all cost study areas.<sup>35</sup> If Heart of Iowa's CLEC lines are considered, the resulting 6046-line study area is larger than only about half—51%—of cost study areas. Accordingly, the instant transaction presents no imbalance of the types with which the Commission has been concerned.

Furthermore, after the purchase Heart of Iowa would remain one of the smaller average schedule carriers. According to USAC's first quarter 2004 data,<sup>36</sup> 505 average schedule study area codes pertain to 502 carriers, with a mean of 5190 lines per study area. With only 2487 lines currently, even by adding the additional 815 lines contemplated in the instant transaction Heart of Iowa will own and operate more than a third fewer lines than most average-schedule companies.<sup>37</sup> These 815 lines represent about three one hundredths of one percent of the some 2.6 million lines owned and operated by average-schedule carriers in the country.<sup>38</sup> If Heart of Iowa's 2744 CLEC lines are considered, the total lines to become average schedule (3559 lines),

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<sup>34</sup> Considering Heart of Iowa's 2744 CLEC lines in the total results in a reduction—from 25% to 14%—in the percentage of post-transaction lines converted from price cap to average schedule.

<sup>35</sup> See USAC HC01; USAC, HC05 - High Cost Loop Projected by State by Study Area - 1Q2004, <http://www.universalservice.org/overview/filings/2004/Q1/> ("USAC HC05").

<sup>36</sup> See USAC HC01 and USAC HC05.

<sup>37</sup> If Heart of Iowa's CLEC lines are considered, Heart of Iowa's resulting 6046-line study area would be only 16% larger than the mean average schedule study area (5190 lines is the mean), and 18% of all average schedule study areas would still be larger than Heart of Iowa's.

<sup>38</sup> See USAC HC01, USAC HC05.

expressed as a percent of total current average schedule lines nationwide, rises slightly, to about fourteen one hundredths of one percent

Heart of Iowa falls within the range of other average schedule companies that the Commission found did not have sufficient resources or expertise to justify conversion of their average schedule status. Further, there is no imbalance between the pre-transaction and post-transaction proportions of average schedule lines. Finally, few lines would be converted to average schedule status. Accordingly, the Commission should grant a waiver of Section 69.605(c).<sup>39</sup>

Moreover, the proposed average schedule waiver will not result in unintended effects on interstate revenue requirements or in administrative burdens on the Commission or NECA.<sup>40</sup> Rather, with respect to its incumbent operations, Heart of Iowa can readily satisfy all three conditions that the Commission has established to avoid these impacts. First, Heart of Iowa will be a single corporate entity operating ten exchanges (rather than a parent and new average schedule subsidiary), and will report to NECA as a single entity for interstate average schedule and Universal Service Fund purposes and receive distributions on that basis. Second, because Heart of Iowa will be a single entity, there will be no possibility that either a “parent” or a “subsidiary” entity will attempt at some future date to elect cost status or Section 61.39 treatment while the other entity does not. Third, Heart of Iowa will be a single entity; absent the highly unlikely event of a comprehensive corporate reorganization, no “parent” or “subsidiary” will come under different control from the other at some future date.

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<sup>39</sup> See, e.g., *Norway Order*

<sup>40</sup> In an email message of November 13, 2003, NECA informed Heart of Iowa’s counsel that NECA has no objection to the instant waiver petition

**IV. WAIVER OF SECTION 69.3(e)(11) OF THE COMMISSION'S RULES IS WARRANTED.**

Heart of Iowa also requests a waiver of Section 69.3(e)(11), if necessary, in order to continue to allow it to use NECA as its tariff pool administrator. Section 69.3(e)(11) requires that any changes in NECA common line tariff participation and long term support ("LTS") resulting from a merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following the merger or acquisition. Thus, Section 69.3(e)(11) may preclude Heart of Iowa from participating in the NECA common line tariff until the next annual access tariff filing effective date following the consummation of the acquisition transaction. This would require Heart of Iowa to file interstate tariffs, and assume the cost and administrative burden associated with that process for a brief period. Moreover, the inclusion of the small number of acquired access lines in the NECA carrier common line tariffs would represent a minimal increase in NECA common line pool participation and would not unduly increase the complexity of administering the LTS program.<sup>41</sup>

In light of the fact that Heart of Iowa is a very small carrier and that the administrative and financial burdens that could result in the absence of a waiver are great, Heart of Iowa requests a waiver of Section 69.3(e)(11) to the extent necessary for it to add these exchanges to its current study area and include them in the NECA pools upon the closing date of this acquisition.

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<sup>41</sup> See, e.g., *Saddleback Communications and Qwest Corporation*, Order, 16 FCC Rcd 21159, 21166 (Acc. Pol. Div. 2001) (Commission granted waiver of Section 69.3(e)(11) for the acquisition of approximately 2700 access lines)



**V. CONCLUSION**

The immediate requests are directly analogous to comparable requests routinely granted by the Commission for similarly situated carriers. Therefore, good cause having been shown, Petitioners respectfully request that this Joint Petition be granted on an expedited basis, thereby affording the affected customers the ability to benefit from the planned acquisition as soon as possible

Respectfully submitted,

**Heart of Iowa Communications Cooperative**

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